(2)

No. 91-570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PMI INDUSTRIES, INC., CONTROL SYSTEMS CORPORATION, WEDGE GROUP, INC. and SALOMON BROTHERS INC,
Petitioners,

v.

FOLGER ADAM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED *

The District Court instructed the jury in this case that information is not material under the federal securities laws unless it "would have caused [a reasonable investor] to alter its views as to the desirability of proceeding with the purchase."

The question presented is whether, as the Second Circuit held, this definition of materiality improperly departed from this Court's definition of materiality in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), and *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), and was likely to be misleading under the circumstances of this case.

* The first question presented by petitioners is not properly before this Court because it was not raised in or decided by the Court of Appeals.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the caption.*

* The following information is provided pursuant to this Court's Rule 29.1: respondent Folger Adam Company ("Folger Adam") has two wholly-owned subsidiaries, Stewart-Decatur Security Systems, Inc. and The William Bayley Company. Folger Adam is a privately-held company.

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STATEMENT OF THE CASE

In March, 1986, defendant Salomon Brothers Inc ("Salomon") was retained by defendant Wedge Group, Inc. ("Wedge") for the purpose of selling two of Wedge's subsidiaries, Stewart-Decatur Security Systems, Inc. ("Stewart") and The William Bayley Company ("Bayley"). Wedge is an investment company, engaged in the buying and selling of companies, and is the parent of defendant PMI Industries, Inc. ("PMI"). PMI is a holding company which was, in turn, the parent of Stewart and Bayley.

Soon after it was retained, Salomon began preparing an offering memorandum to be distributed to potential buyers of Stewart and Bayley (the "Salomon offering memorandum"). Toward that end, Salomon requested

that Stewart and Bayley's management send Salomon certain information, including earnings projections. In response, the Stewart and Bayley management sent projections to Salomon that predicted that those companies' earnings would fall from $4.8 million in 1986 to $2.9 million in 1987; $2.3 million in 1988; $2.5 million in 1989; and $2.6 million in 1990.

These nosedive projections were included in Salomon's initial drafts of the offering memorandum. At the insistence of Wedge and PMI, however, the projections were removed from the version of the Salomon offering memorandum that was distributed to potential buyers. In their place appeared a reference to $4.8 million in budgeted earnings for 1986, and the representation that "management believes that net sales and net income for fiscal year 1986 should increase over 1985 levels and *remain strong in the future.*" (Emphasis added).

Folger Adam Company ("Folger Adam") received the Salomon offering memorandum early in the summer of 1986. Soon thereafter, Folger Adam began negotiating with Wedge/PMI and Salomon for the purchase of Stewart and Bayley. During those negotiations, Folger Adam told Wedge/PMI and Salomon that it was interested in "buying an earnings stream," and Folger Adam persistently asked the sellers' representatives for earnings projections. Wedge/PMI and Salomon initially told Folger Adam that there were no earnings projections for Stewart and Bayley. In the fall of 1986, however, Folger Adam received written projections which, according to the sellers, "conservatively" predicted $4 million in earnings for Stewart and Bayley in 1987. Unbeknownst to Folger Adam, at an earlier meeting in the fall of 1986 to discuss Folger Adam's repeated requests for projections, the Stewart and Bayley management, consistent with their views expressed earlier in the year, told Wedge/PMI that earnings in 1987 would fall to $2.4 million. In response, Wedge/PMI told management

that that number was "unacceptable." Shortly thereafter, Folger Adam received the "conservative" $4 million written projections.

On December 22, 1986, Folger Adam purchased 100% of the outstanding stock of Stewart and Bayley for approximately $28.5 million. Within a few weeks after the closing, Folger Adam learned that Stewart and Bayley's earnings would fall far short of the "conservative" $4 million written projections. (In fact, the actual 1987 earnings for Stewart and Bayley were about $500,000, one-eighth of the "conservative" $4 million projections.) In July 1987, approximately seven months after the closing, Folger Adam learned for the first time of the nose-dive earnings projections that had been included in the earlier drafts of the Salomon offering memorandum, but were removed from the version of the Salomon offering memorandum sent to Folger Adam. Folger Adam also learned for the first time that the management of Stewart and Bayley had predicted on other occasions before the closing that after 1986 the earnings of those companies would decline precipitously.

In December 1987, Folger Adam filed this lawsuit in the United States District Court for the Southern District of New York. Folger Adam asserted claims under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; and the common law.

Before trial, Wedge/PMI and Salomon filed separate motions for summary judgment. One of the arguments advanced by Wedge/PMI in support of their motion was that Folger Adam had no Section 12(2) claim, on the ground that Folger Adam did not purchase the stock of Stewart and Bayley in an initial public offering. Although Salomon submitted more than 200 pages of briefing in support of its separate motion for summary judgment, Salomon never made such an argument in the Dis-

trict Court. The District Court denied the defendants' summary judgment motions, and expressly rejected Wedge/PMI's argument that Section 12(2) was inapplicable, as a matter of law, in this case.

A jury trial began in May, 1990. A critical issue at trial was whether the representations made to Folger Adam during the selling process, as well as the information not disclosed to Folger Adam, were material under the federal securities laws. Through the course of a seven-week trial, both sides offered evidence on that pivotal issue.[1] At the close of the evidence, after several charge conferences and over Folger Adam's strenuous objections, the District Court gave a materiality charge to the jury which included the following statement:

> That certain information would have satisfied the curiosity of any particular investor has nothing to do with the question of materiality unless you find a substantial likelihood that the information supplied in satisfaction of such curiosity would have had, in the view of a reasonable investor, the effect of significantly altering the total mix of information available *and thus would have caused it to alter its views as to the desirability of proceeding with the purchase.*

Pet. App. at 5a n.2 (emphasis added).

After the jury began deliberating, but before the transcription of the charge had been completed, the jury specifically asked to see the written charge. Upon receiving the written charge, the jury found that petitioners

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[1] Petitioners contended that the concealed nosedive projections were not material on the ground that they were prepared "hurriedly" by Stewart and Bayley management, which was "conflicted." Folger Adam strongly disagreed and pointed out, *inter alia*, that petitioners themselves agreed that the Stewart and Bayley management was honest, competent, and experienced, and that, notwithstanding the purported "deficiencies" in the concealed projections, Salomon displayed them prominently in the undisclosed versions of the offering memorandum.

had not made material misrepresentations or omissions in connection with the sale of the stock of Stewart and Bayley, and the District Court entered judgment against Folger Adam.

Folger Adam filed post-trial motions for judgment notwithstanding the verdict and for a new trial, which the District Court denied on August 1, 1990.[2] In their separate briefs on appeal, neither Wedge/PMI nor Salomon raised the argument, previously made only by Wedge/PMI in the District Court, that Section 12(2) applies only to an initial public offering of securities.

On July 15, 1991, the Second Circuit reversed the judgment entered by the District Court. The panel unanimously held that Folger Adam had not received a fair trial because the District Court gave "an erroneous jury charge regarding the meaning of the materiality requirement of the federal securities laws." The Second Circuit found that, contrary to this Court's directives in *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), and *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), the District Court had failed to make clear that information can be material to an investor without necessarily changing the investor's decision whether to consummate a transaction. The District Court's failure to instruct the jury on this critical distinction was compounded by the court's instruction that information is not material unless it "would have caused [a reasonable investor] to alter its views as to the desirability of proceeding with the purchase." In light of this instruction, the Second Circuit found that, at best, the materiality charge was likely to be misleading and confusing in the circumstances of this case.

Rehearing and rehearing en banc were denied on August 29, 1991; none of the members of the panel nor

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[2] The District Court's opinion denying Folger Adam's post-trial motions is reproduced as an Appendix to this Opposition.

any other judge of the Second Circuit wished to hear reargument.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Petitioners' first question presented—whether Section 12(2) of the Securities Act of 1933 applies to the sale of securities outside of an initial public offering—is not properly before this Court and, in any event, would not be appropriate for this Court's consideration in this case.

First, petitioners concede that they never raised the Section 12(2) issue in the Second Circuit. It therefore is not properly before this Court, and there are no exceptional circumstances that would warrant this Court's review in the absence of the Court of Appeals' consideration of the issue. Second, the petition presents no conflict for this Court to resolve. Because the Second Circuit did not even consider, much less decide, the Section 12(2) issue, its decision does not and could not possibly conflict with the decision of any other court on this issue. Nor is there even any split among the other courts of appeals on this point, since the Third Circuit is the only Court of Appeals to have addressed the issue thus far. Moreover, the District Court's decision that Section 12(2) is applicable in a case like this (where Folger Adam purchased all of the stock of two privately-held companies directly from the companies' owners) is correct. The cases cited by petitioners as in conflict on this point (all but one of them district court decisions) arise in completely different factual and legal settings.

2. Nor is there any merit to petitioners' second contention, that the Court of Appeals "preclud[ed]" the use of one of the "formulations of the materiality test set forth in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)." Pet. at 16. The District Court in this case gave an unprecedented, aberrational jury instruction on materiality, which erroneously made re-

liance the be-all and end-all of the inquiry as to materiality. The Court of Appeals explicitly endorsed the continued validity and vitality of this Court's "total mix" formulation. The Second Circuit's application of this Court's settled precedents on materiality to one specific, isolated, confusing jury instruction does not warrant review by this Court.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT A PROPER CASE IN WHICH TO CONSIDER WHETHER SECTION 12(2) OF THE SECURITIES ACT OF 1933 APPLIES IN SITUATIONS OTHER THAN INITIAL PUBLIC OFFERINGS.

A. The Issue Is Not Properly Before This Court Because It Was Not Raised in or Considered by the Court of Appeals.

Petitioners each filed lengthy briefs in the Second Circuit in which they raised and argued many issues. Yet, as petitioners concede, they never made any argument on appeal that respondent could not rely on Section 12(2) on the ground that it bought the stock of Stewart and Bayley other than in an initial public offering. See Pet. at 8 n.5. Nor did the Court of Appeals address this issue in any way.

The Section 12(2) issue therefore is not properly before this Court, which repeatedly has made clear that it will not consider on a writ of certiorari an issue not raised in the court of appeals. See, *e.g.*, *Davis* v. *United States*, 110 S. Ct. 2014, 2024 (1990); *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 110 S. Ct. 424, 440 n.18 (1989); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *County of Oneida, New York* v. *Oneida Indian Nation*, 470 U.S. 226, 244-45 (1985); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). The Court looks for a fully developed record, including the guidance of the court of appeals, on all

issues that it addresses. See, *e.g.*, *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 277 n.23 (1989); *Youngberg* v. *Romeo*, 457 U.S. 307, 316 n.19 (1982). See also 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4036, at 38-39 (2d ed. 1988 & Supp. 1991) (Court reluctant to consider an issue not addressed by the court of appeals, even if properly raised, because it would lose "the advantage of prior appellate scrutiny of the record and deliberation of the arguments").

By failing to raise the Section 12(2) issue on appeal, petitioners have deprived this Court of the Second Circuit's analysis and views on that issue. The loss is especially unfortunate because, as petitioners point out, the Second Circuit is highly regarded for its " 'preeminence in the field of securities law.' " Pet. at 19 n.11 (quoting *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)).

Thus, while this Court has the power to deviate from its general rule, "[i]t is only in exceptional cases coming [to this Court] from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)). This is surely not such an exceptional case.[3] Indeed, petitioners have

[3] The cases cited by petitioners (Pet. at 8 n.5) are radically different from this case. For example, in *Wood* v. *Georgia*, 450 U.S. 261 (1981), the Court *sua sponte* raised a due process issue arising from a possible conflict of interest involving the lawyer representing the petitioners. The issue was not raised in the lower courts, of course, since "[t]he party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused." *Id.* at 265 n.5. In both *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), this Court proceeded to address the merits of the important issues raised by the petitioners after holding that the court of appeals had improperly dismissed the appeals. Thus, although the petitioners had raised the issues and attempted to argue them

not even attempted to justify their failure to raise the Section 12(2) issue in the Court of Appeals.[4] Wedge/PMI argued the point in the District Court, but chose not to pursue it in the Second Circuit. Salomon did not think enough of the argument to raise it in either the District Court or the Court of Appeals. This previously abandoned argument "is so obviously an afterthought" as not to warrant any consideration by this Court. See *Miree* v. *DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977).[5]

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in the appellate courts, they had been prevented from doing so by that court's erroneous dismissal of the appeals.

In *Youakim*, the Court permitted petitioners to pursue on remand a claim that had not been raised in the lower courts, because the claim was similar to one that had been raised below; the district court's rulings made clear that it would have rejected the "new" claim if it had been raised; and developments in the law after the district court's rulings significantly affected the viability of the "new" claim. 425 U.S. at 234-37. In *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980), the Court considered an issue not raised below where the respondent did not object and where the issue was important, recurring, and had been properly raised in another case that was being held pending disposition of *Carlson*.

[4] Petitioners were, of course, entitled to urge any ground on appeal in support of the judgment in their favor, "even if the court below ha[d] rejected or not dealt with the contention." R. Stern, *Appellate Practice in the United States* 124 (2d ed. 1989). Nothing prevented petitioners from arguing in the alternative on appeal that they were entitled to judgment as a matter of law on the Section 12(2) claim. Indeed, Salomon's primary argument in the Court of Appeals was that "The Jury Instructions Are Irrelevant As To Salomon Because It Was Entitled To A Directed Verdict." While Salomon advanced a number of arguments in support of that proposition, it never even mentioned the Section 12(2) argument that it now is trying to raise in this Court, for the very first time anywhere.

[5] Petitioners argue that a writ of certiorari should issue on this question in order to "avoid a needless retrial of respondent's Section 12(2) claim." Pet. at 15. This argument, like petitioners' failure to raise the Section 12(2) issue in the Court of Appeals, fundamentally misconceives the respective roles of this Court and the lower federal courts. Petitioners should have presented to the

B. The Petition Presents No Conflict in Need of Resolution by This Court.

1. *The Court of Appeals Has Not Rendered a Decision in Conflict With That of Any Other Court of Appeals.*

Rule 10.1(a) of this Court's rules notes that a writ of certiorari may be appropriate "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." In this case, however, the Second Circuit was not even presented with, and did not address or decide, the Section 12(2) issue as to which petitioners claim there is a conflict.

Undeterred by their own indifference to the issue in the Court of Appeals, and the absence of any ruling on the issue by that court, petitioners now seek to rely on an asserted conflict on the question between the Third and Seventh Circuits. We explain in the next section that in fact there is no such conflict. But even if there were, it would not matter. This Court's rules obviously do not contemplate that the Court will grant certiorari to resolve a conflict between other circuit courts not even addressed in or presented by the decision of the court of appeals under review.

2. *There Is No Conflict Between or Among Any Other Courts of Appeals on the Section 12(2) Issue.*

Petitioners claim that the Third Circuit in *Ballay* v. *Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991), and the Seventh Circuit in *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991),

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Court of Appeals their argument as to the inapplicability of Section 12(2). This Court does not sit merely to correct error, particularly a claimed error of a district court, without benefit of review by the intermediate appellate court where such review was deliberately bypassed.

have considered and resolved differently the Section 12(2) issue raised in the petition. The truth, however, is that only *Ballay* addressed the Section 12(2) issue, and therefore there is no conflict between that decision and that of any other circuit court on this issue.

In *Ballay*, the Third Circuit held that no claim could lie under Section 12(2) against a brokerage firm by buyers of publicly-traded securities in the secondary market. The court explicitly noted that this question, "whether section 12(2) of the Securities Act of 1933 affords a remedy to a buyer of securities in the secondary market", was one "*not yet ruled upon by any federal appellate court.*" 925 F.2d at 684 (emphasis added).

Petitioners' argument that *Ballay* is in conflict with the Seventh Circuit's *earlier* decision in *Short* is patently frivolous. The plaintiff in *Short*, a 10b-5 case, did not even assert a Section 12(2) claim, nor could she have, since she was a seller rather than a purchaser of securities. See 908 F.2d at 1390. The Seventh Circuit did not in any way address—by way of holding, dictum, or otherwise—the Section 12(2) issue later decided by the Third Circuit in *Ballay*. Rather, in considering what statute of limitations should be applied to the plaintiff's 10b-5 claim, the Seventh Circuit briefly described the 1933 and 1934 securities Acts and made the following general statement about the 1933 Act:

> Section 12(1) deals with sales "in violation of Section 5"—that is, unregistered sales of securities required to be registered. Section 12(2) addresses all other forms of materially incorrect or misleading selling literature and oral communications in the sale of a security.

908 F.2d at 1390. This general comment, in a completely different context, does not even address the Section 12(2) issue decided in *Ballay*.

Thus, the "conflict" posited by petitioners is contrived and non-existent. *Ballay* is the only decision by a circuit

court addressing the applicability of Section 12(2) to the trading of publicly-held securities in the secondary market, and this Court already has denied certiorari in that case. 112 S. Ct. 79 (1991). There is simply no conflict among the courts of appeals for this Court to resolve.[6]

C. The District Court's Ruling, That Section 12(2) Applies to the Sale of All of a Company's Stock by the Owner of the Company, Is Correct and Not in Conflict With the Decisions Cited by Petitioners.

Wedge/PMI (but not Salomon) argued in the District Court that Section 12(2) was inapplicable because Folger Adam did not buy the stock of Stewart and Bayley in an initial public offering. The District Court rejected that argument, stating:

> Unfortunately for [Wedge/PMI], the Supreme Court five years ago decisively rejected a narrow interpretation of Congressional intent and, without making any distinction between "newly created" securities and those existing prior to sale, declared that § 12(2) applies to the private sale of a company's stock. *See Gould* v. *Ruefenacht* (1985) 471 U.S. 701 (sale of stock previously held by company president); *Landreth Timber Co.* v. *Landreth* (1985) 471 U.S. 681 (sale of stock previously held by owners of family business).

Pet. App. at 18a.

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[6] Moreover, the holding of the Third Circuit in *Ballay*—that Section 12(2) does not apply to the trading by a brokerage house of publicly-traded securities in the secondary market (*e.g.*, a stock exchange)—does not even address the applicability of Section 12(2) to a case like this one, where there has been a sale of securities *by the owner of the company*. Thus, it would be extraordinary, to say the least, for this Court to consider the *Ballay* question here when it is not at issue in this case. See *Belcher* v. *Stengel*, 429 U.S. 118, 119 (1976) (dismissing writ of certiorari as improvidently granted where it appeared that the issue being considered was "not in fact presented by the record now before [the Court]"). *Accord*, *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228, 229-30 (1972).

The District Court was correct. *Gould* and *Landreth* put to rest any notion that Section 12(2) does not apply unless securities are purchased in an initial public offering. In both of those cases, like this case, there was no initial public offering. The plaintiff in *Gould* purchased 50% of the existing shares of a closely-held corporation. He asserted claims against the seller under the federal securities laws, including Section 12(2), based upon alleged misrepresentations made during the course of negotiations. Similarly, in *Landreth*, the plaintiff purchased 100% of the stock of a closely-held corporation, pursuant to an offering letter allegedly containing misrepresentations. He asserted claims against the sellers under Section 12(1) of the 1933 Act, 15 U.S.C. § 77l(1).

In both *Gould* and *Landreth* this Court held that the transactions at issue—the private sale of a company via the sale of its stock—were subject to the 1933 Act. The Court rejected the so-called "sale of business" doctrine, which posited that the private sale of controlling shares of a closely-held corporation should not be treated as the sale of a "security." In *Landreth*, the Court stated that it could not agree "that the Acts [including the 1933 Act] were intended to cover only 'passive investors' *and not privately negotiated transactions involving the transfer of control to 'entrepreneurs.'*" 471 U.S. at 692 (emphasis added).[7] The Court's analysis makes clear that the 1933

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[7] Petitioners have attempted to distinguish *Gould* and *Landreth* by arguing that "[t]hose decisions stated that the issue before the Court was whether the sale of all or 50% of the stock of a company 'is a securities transaction subject to the *antifraud* provisions of the federal securities laws.'" Pet. at 14 (emphasis by petitioners) (quoting *Gould* and *Landreth*). But the Court held in *Gould* and *Landreth* that the antifraud provisions of the federal securities laws *do* apply to a private sale of all or a substantial portion of a company's stock, and the antifraud provisions of the federal securities laws *include* Section 12(2). *Akerman* v. *Oryx Communications, Inc.*, 810 F.2d 336, 344 (2d Cir. 1987); L. Loss, *Fundamentals of Securities Regulation* 248 (Supp. 1991).

Act, including Section 12(2), applies to precisely the transaction at issue in this case.[8]

The very authorities upon which petitioners rely actually belie their argument. For example, petitioners selectively quote from a statement in the House Report accompanying the 1933 Act, asserting that the "report states that the 1933 Securities Act was meant to 'affect[] only new offerings of securities . . . .'" Pet. at 12. The full text of the statement, however, reads as follows:

> The bill affects only new offerings of securities sold through the use of the mails or of instrumentalities of interstate or foreign transportation or communication. It does not affect the ordinary redistribution of securities *unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.*

H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933) (emphasis added). Petitioners here surely possessed "the control of the issuer" in disposing of the stock of Stewart and Bayley.[9]

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[8] Petitioners suggest incorrectly that Professor Loss endorses their position that Section 12(2) applies only to initial public offerings. See L. Loss, *Fundamentals of Securities Regulation* 887 (2d ed. 1988) ("To start with [Section 12(2)] applies to all sales of securities, *whether or not registered* . . . .") (emphasis added). The *Landreth* Court also noted Professor Loss' criticism of the sale of business doctrine, stating: "He considers that the doctrine 'comes dangerously close to the *heresy* of saying that the fraud provisions do not apply to private transactions . . . .'" 471 U.S. at 692 n.6 (emphasis added, citation omitted). Indeed, Professor Loss believes that Section 12(2) is applicable even to the sale of publicly-traded securities in the secondary market, and therefore that *Ballay* was wrongly decided. L. Loss, *Fundamentals of Securities Regulation* 247-49 (Supp. 1991).

[9] Wedge/PMI owned 100% of the stock of Stewart and Bayley. They accordingly received the entire purchase price paid by respondent for that stock. As the owners of the Stewart and Bayley stock, Wedge/PMI (together with Salomon, their agent and investment adviser) initiated and directed the selling process. Wedge/PMI involved the management of Stewart and Bayley in the selling

Not surprisingly, Section 12(2) claims commonly have been asserted in securities fraud lawsuits against sellers of a company via the private sale of the company's stock. See, *e.g.*, *Astor Chauffeured Limousine Co.* v. *Runnfeldt Inv. Corp.*, 910 F.2d 1540 (7th Cir. 1990); *Devaney* v. *Chester*, 813 F.2d 566 (2d Cir. 1987); *Schaafsma* v. *Morin Vermont Corp.*, 802 F.2d 629 (2d Cir. 1986); *Polycast Technology Corp.* v. *Uniroyal, Inc.*, 728 F. Supp. 926 (S.D.N.Y. 1989). Petitioners have not cited a single case holding that Section 12(2) does not apply to the sale of 100% of the privately-held stock of a company by the owner of the company.[10] Thus, it is hard to imagine a case less requiring this Court's attention.

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process, as owners of an operating company typically do when they decide to sell the operating company, but as the owners Wedge/PMI remained firmly in control. The president of Stewart and Bayley met with representatives of Folger Adam at the direction of the president of PMI, rather than "on an independent basis." And the president of Wedge appropriately regarded the Stewart and Bayley management as "our people." There can be no greater "control" over securities than the control that petitioners exercised here over the sale of their own stock.

[10] Instead, petitioners have string-cited a number of federal district court cases, ostensibly in support of their argument that Section 12(2) does not apply in this case (Pet. at 6-7 n.3), but most of those cases, like *Ballay*, are brokerage cases. Petitioners have also cited a line of cases, even less relevant to the instant case, where purchasers of stock who asserted a claim under Section 12(2) were unable to allege or prove that they purchased their stock *pursuant to* an allegedly misleading prospectus. Those plaintiffs just happened to purchase securities in the secondary market around the same time that the original issuer sold new securities, via allegedly fraudulent offering materials, in an initial public offering. Some courts have held that in such cases, there is an insufficient connection between the stock purchased by the plaintiff and the allegedly fraudulent offering materials to support a claim under Section 12(2). See, *e.g.*, *Ackerman* v. *Clinical Data, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,207 (S.D.N.Y. July 8, 1985); *Klein* v. *Computer Devices, Inc.*, 591 F. Supp. 270 (S.D.N.Y. 1984); *Gross* v. *Diversified Mortgage Investors*, 431 F. Supp. 1080 (S.D.N.Y. 1977), *aff'd without opinion*, 636 F.2d 1201 (2d Cir. 1980). Such cases are wholly inapposite here, where petitioners made misrepresentations and omissions to respondent in connection

II. THERE IS NO NEED FOR REVIEW OF THE COURT OF APPEALS' FACT-SPECIFIC APPLICATION OF THIS COURT'S SETTLED PRINCIPLES CONCERNING MATERIALITY.

Petitioners contend that this Court should issue the writ in order to "reestablish" the "total mix" test set forth in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). There is no such need. The District Court, in its unique charge, grossly distorted and misstated the "total mix" test. The Second Circuit corrected that critical error by making manifestly clear that this Court's "total mix" test must be properly stated and applied.

In *TSC*, the Court held that information "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." 426 U.S. at 449. The Court also offered an alternative formulation: "Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* More recently, in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 234 (1988), this Court further refined and clarified the definition of materiality: "The role of the materiality requirement is . . . to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his investment decision."

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with the sale of the stock of Bayley and Stewart, and respondent bought that stock.

Thus, the federal district court cases cited by petitioners do not conflict with the decision of the District Court here that Section 12(2) applies to the private sale of a company's stock by the owner of the company. Of course, even if there were a conflict between the District Court's decision and that of other district courts or even a court of appeals, this Court would not address the conflict at that level. See R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 207 (6th ed. 1986).

There is, of course, a critical difference under the federal securities laws between materiality and reliance. Information can be material to a buyer without changing the buyer's investment decision. In *TSC*, this Court made the point by stating unequivocally that materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote." 426 U.S. at 449. As the Second Circuit explained in this case, "No matter how stated . . . it is well-established that a material fact need not be outcome-determinative." Pet. App. at 6a.

Notwithstanding this Court's admonitions, the District Court gave a materiality charge that utterly failed to inform the jury that information could be material without necessarily being outcome-determinative. Even worse, the District Court affirmatively led the jury to believe that for information to be material it must be outcome-determinative, by instructing that information is not material unless it "would have caused [a reasonable investor] to alter its views as to the desirability of proceeding with the purchase." Pet. App. at 5a n.2.

Thus, the District Court's charge transformed the "total mix" test into an outcome-determinative test which flew in the face of *TSC* and *Basic*. At the very least, as the Second Circuit explained, a reasonable juror could have become confused and understood the charge to mean that materiality was necessarily outcome-determinative. Pet. App. at 8a. The strong probability that the jury was misled by the District Court's charge, under the circumstances and on the dispositive issue in the case, required that the judgment be reversed. *Francis* v. *Franklin*, 471 U.S. 307, 325 (1985); *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946).[11]

[11] In its opinion denying Folger Adam's post-trial motions, the District Court stated that "the mere fact that one might alter one's views as to the desirability of proceeding with a transaction,

Thus, there is no need for this Court to "reestablish" the "total mix" formulation of materiality, since the Second Circuit made clear that it believed the "total mix" formulation is a proper charge on materiality. In this case, the Second Circuit simply reversed the judgment below because the District Court had grossly distorted the "total mix" test in its one-of-a-kind jury instruction. This type of *sui generis* situation does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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did not *necessarily* mean that such alteration would ultimately result in a different course of action." Opp. App. at 7a (emphasis added). By stating that the charge did not "necessarily" mean that for information to be material it must "ultimately result in a different course of action" by the buyer, the District Court implicitly recognized that, at the very least, the jury reasonably could have interpreted the charge that way. The District Court did not believe that that possibility warranted a new trial, but as the Second Circuit explained, "the proper inquiry is not whether the jury *necessarily* misconceived the meaning of the materiality charge, but whether, given the ambiguity in the charge, the jury *might* have misunderstood the controlling standard of law." Pet. App. at 8a n.7 (emphasis by court).

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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87 Civ. 9272 (WK)

FOLGER ADAM COMPANY,
Plaintiff,

-against-

PMI INDUSTRIES, INC., CONTROL SYSTEMS CORPORATION, WEDGE GROUP, INC. and SALOMON BROTHERS INC,
Defendants.

MEMORANDUM & ORDER

WHITMAN KNAPP, D.J.

Plaintiff Folger Adam Company moves for a judgment notwithstanding the verdict and, in the alternative, for a new trial. For reasons which follow, we deny the motions.

BACKGROUND

In December 1986, plaintiff Folger Adam Company, after an extensive due diligence investigation, purchased from defendants PMI Industries, Inc., Control Systems Corporation, and Wedge Group, Inc. all outstanding stock of Stewart-Decatur Security Systems ("Stewart") and William Bayley Company ("Bayley") (collectively, "the companies"), two companies that, like Folger Adam, were in the detention equipment business. Defendant Salomon Brothers, Inc served as investment banker for the other defendants. A year later in December 1987, finding that the companies' earnings had fallen far short of its expectations, plaintiff filed this suit, alleging that it had been

misled by, among other things, defendants' failure to include certain earnings projections prepared by the companies' operating managers in a selling memorandum and various untrue statements made in that memorandum and during the course of the due diligence investigation.[1]

As demonstrated by the charge and the special verdict questionnaire submitted to the jury, there were two distinct theories of liability upon which plaintiff could have recovered: first, § 12(2),[2] which for a prima facie case required only proof that there had been a material misrepresentation[3] in any oral or written communication made by anyone in connection with the sale and that plaintiff had been unaware that it was a misrepresentation[4] and, second, § 10(b),[5] which required, among other things, proof that a particular defendant, with intent to deceive, had made a material misrepresentation on which plaintiff had justifiably relied.

Plaintiff, however, in its presentation of the case to the jury, made no effort to distinguish between these two theories. On the contrary, throughout the trial, it continually urged that its decision to purchase the companies was fundamentally predicated upon various misrepresentations wilfully made to it (*See, e.g.*, Opening Statement tr. 12-15, 28-32; Summations tr. 3283-86, 3302-03).[6] In

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[1] For a fuller outline of plaintiff's contentions, see our Memorandum & Order of March 29, 1990 denying summary judgment.

[2] Securities Act of 1933, 15 U.S.C. § 77l(2).

[3] Throughout this memorandum, unless otherwise indicated, the term "misrepresentation[s]" encompasses misstatement[s] and omission[s].

[4] We held that the other elements of the § 12(2) claim had been established as a matter of law.

[5] Securities Exchange Act of 1934, 15 U.S.C. § 78j and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder.

[6] Indeed, careful examination of plaintiff's opening statement and both of its summations will not reveal a single word suggesting

support of this contention, Leonard Shaykin and Donald Stading, the key decisionmakers for plaintiff, testified that if the operating managers' projections been disclosed to them, they would not have gone through with the sale (Shaykin tr. 208-09; Stading, tr. 1074) and that they believed and relied upon the higher projections provided in the selling memorandum (Shaykin tr. 167-169, 172) and orally (Shaykin tr. 169, 172, 194-95; Stading tr. 1049-50). Defendants' response to these contentions was that in the particular circumstances of the transaction here involved—where plaintiff was not primarily seeking to purchase the companies for their inherent profitability but for strategic reasons [7] and had had the advantage of an exhaustive due diligence investigation—it would have been inconceivable that a reasonable investor would have deemed important or justifiably relied upon any misrepresentation that defendants might have made.

Both sides called expert witnesses to make their respective positions appear more plausible. Plaintiff called Peter Linneman, a business school professor, who testified that any purchaser would have deemed important and would have justifiably relied upon precisely the kinds of information which defendants in fact withheld from plaintiff. Defendants called Barbara Preiskel who, on the basis of her experience as a director of numerous corporations engaged in similar acquisitions, testified that no reasonable investor seeking to acquire a company for strategic reasons and having had the benefit of a full dress due diligence investigation would have deemed im-

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that the jury could return a verdict for plaintiff without finding reliance by plaintiff and scienter in the defendants.

[7] Defendants maintained that, since Folger Adam sought to purchase the companies to obtain the "strategic" benefits that combining them with Folger Adam would bring—benefits such as reduced competition, joint marketing efforts, shared plants and intracompany sales of certain products—management projections as to what the companies would earn if they were to continue as independent companies were immaterial (*see, e.g.*, Salomon summation tr. 3509-10).

portant or could justifiably have relied upon such information.

On June 28, 1990, after a seven-week trial, the jury returned a verdict for defendants.[8] Plaintiff bases its present motions on claimed deficiencies in the charge and in various evidentiary rulings concerning expert witnesses.[9]

DISCUSSION

I. *The Charge*

Plaintiff asserts that the charge to the jury was inconsistent with the law as declared in *TSC Industries, Inc. v. Northway, Inc.* (1976) 426 U.S. 438. We agree that *TSC* is here controlling[10] but conclude that the charge, as given, was in full conformity therewith.

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[8] The jury made its finding by answering "no" to the following question:

> Has Folger Adam persuaded you that it is more probable than not that, in connection with the sale of Stewart and Bayley, any written or oral communication was made to Folger Adam which
>
> (a) contained any misstatement(s) of material fact?
>
> or (b) omitted any material fact(s) necessary to prevent such communication, in light of the circumstances under which it was made, from being misleading?

[9] Plaintiff has submitted two memoranda in support of its motions: "Plaintiff Folger Adam Company's Memorandum of Law in Support of Its Motion for a New Trial" and "Plaintiff Folger Adam Company's Memorandum of Law in Support of Its Motion for a Judgment Notwithstanding the Verdict or in the Alternative for a New Trial." The second of these concerns itself with arguments previously advanced in support of motions for partial summary judgment and for a directed verdict. We reject those arguments for the same reasons we previously rejected them. *See* Memorandum & Order, March 29, 1990. This opinion, therefore, will concern itself only with arguments made in the first memorandum.

[10] Plaintiff correctly observed at p. 5 of its memorandum that, during a charging conference, we had questioned whether the adjective "material" should always have the same legal meaning regardless of the nature of the alleged "misrepresentation" it modified. We suggested that the meaning might be different where, as in *TSC*,

It is important to note that one of the Court's principal objectives in *TSC* was to resolve perceived ambiguities in certain language in Justice Harlan's opinion in *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375. In *TSC*, respondent Northway Inc., a stockholder of petitioner TSC, had brought a derivative action for damages growing out of an alleged material omission from a proxy statement pursuant to which TSC had been acquired by another company. The District Court, finding that there remained a genuine issue of fact as to whether or not the omission had been material, had denied a respondent's motion for summary judgment. The Court of Appeals for the Seventh Circuit, in heavy reliance upon *Mills*, had formulated the following definition of materiality: "all facts which a reasonable shareholder *might* consider important." *TSC*, 426 U.S. at 445 (emphasis added by the Supreme Court). Employing that definition, the Court of Appeals had found the omissions to have been material as a matter of law and, reversing the District Court, had directed the entry of partial summary judgment.

The Supreme Court, concluding that the Court of Appeals' reliance upon the *Mills* language had been "misplaced" (*id.* at 446), reversed and reinstated the judgment of the District Court. The Supreme Court adopted the Second Circuit's view as expressed by Judge Friendly that the "might" formulation adopted by the Seventh Circuit was " 'too suggestive of mere possibility, however, unlikely' " (*id.* at 449, *quoting Gerstle v. Gamble-Skogmo, Inc.* (2d Cir. 1973) 478 F.2d 1281, 1302), and established the follow standard:

"material" modified a "misrepresentation" made in a statement addressed to a wide cross-section of persons, many if not most of whom would have had few sources of information other than the statement itself from a situation where, as here, it modified various alleged misrepresentations contained in statements made either in the course of a full scale due diligence investigation or in anticipation of such an investigation. However, as our charge reflects, we discarded that idea before beginning to address the jury.

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . What the standard does contemplate is a showing of substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

TSC at 449.

Adapting the foregoing standard to the facts and arguments before us, we charged as follows:

> In the context of this case, a fact is material when there is a substantial likelihood that, if a reasonable investor had learned of the falsity of the misstatement of fact or the existence of the omitted fact, that investor would have regarded the total mix of information available to have been significantly altered.
>
> By total mix of information, I mean all the information from any source available to such investor at the time it made a decision.
>
> I note that a number of the witnesses were asked whether they would have wanted to know certain information under certain circumstances. An answer to such a question is by no means determinative of whether or not materiality as I defined it has been established. *That certain information would have satisfied the curiosity of any particular investor has nothing to do with the question of materiality unless you find a substantial likelihood that the information supplied in satisfaction of such curiosity would have had, in the view of a reasonable investor, the effect*

> *of significantly altering the total mix of information available and thus would have caused it to alter its views as to the desirability of proceeding with the purchase.*
>
> In other words, information is material when there is a substantial likelihood that a reasonable investor in Folger Adam's circumstances would have regarded the total mix of information available to it—all the information gleaned from the due diligence investigation, publicly available information about the companies and of the detention industry in which they operated—to have been significantly altered, had it discovered that management's views of the companies' prospects were inaccurate or had the lower figures been disclosed.

Tr. 3626-28 (emphasis added in pl. br. at 2-3 n. 1).

Contrary to plaintiff's assertion, the charge did not suggest that plaintiff was required to establish a substantial likelihood that the disclosure would have "resulted in a different decision by the investor." In *TSC*, the mere fact that a shareholder would consider certain information important "in deciding to vote" did not necessarily mean that consideration of such information would ultimately change his decision. So here, the mere fact that one might alter one's views as to the desirability of proceeding with a transaction, did not necessarily mean that such alteration would ultimately result in a different course of action. In either situation, the requirement is simply that the omitted matter be sufficiently significant to cause the shareholder or investor to give thought to the problem with which he was faced; *i.e.*, that it "would have assumed actual significance in [his] deliberations." *Id.*, 426 U.S. at 449.

II. *The Evidentiary Rulings*

Plaintiff's claims of evidentiary error center on the testimony of its own expert witness, Linneman, and on

that of defendants' expert, Preiskel. Plaintiff contends that Linneman was unduly restricted and that Preiskel was not properly qualified to express the opinions to which she testified. Neither contention has merit.

As plaintiff correctly points out, before Linneman took the stand, we ruled that he could not "refer to any particular document or any particular piece of information" (tr. 1355) or give his opinion as to whether "Salomon Brothers did or didn't do certain things and whether Salomon should or shouldn't have done certain things" (tr. 1425). According to plaintiff's brief, these rulings undermined its "expectation" that Linneman would, in the course of his testimony, be permitted to testify that operating managers' views of their companies' prospects are "important" to investors; to assess the importance of those views in the context of this case; to examine specific documents and testimony concerning the sale; to testify "regarding specific events involved in the sale"; and to express his opinion on some of the "ultimate" factual issues in the case (pl. br. at 12).

An examination of the transcript reveals that, whatever ~~may~~ have been the intent of our initial rulings, Linneman was not precluded from giving testimony with respect to any of the foregoing matters. First of all, Linneman testified repeatedly that he believed that the operating managers' projections were "important" to investors. For example, plaintiff's counsel elicited this testimony:

> Q. Dr. Linneman, whose projections in your opinion are most important to potential buyers?
>
> A. Clearly you want to have those management, operating management projection[s].
>
> Q. When you say operating management who do you mean by operating management?
>
> A. The people, whoever they are, who are at the company day to day making the decisions about what

> that company does, which employees are there, who gets hired to replace the employees that leave, where you buy your steel from, where you get—those kind of decisions that matter. Those are the people who know the company. That's why their views are invaluable (tr. 1454-55).

See also tr. 1439-44, 1451-52, 1461-63, 1471-72, 1474-79, 1482-83. He went on to testify that "management projections always matter, in my opinion at least" (tr. 1476) and that a buyer would "always want" them (tr. 1477). With plaintiff's counsel's prompting, Linneman even named the men who, in his view, were the operating managers of the companies (tr. 1468-71).

Having established that Linneman thought that projections prepared by operating managers were important and that specific persons at the companies were those operating managers, plaintiff's counsel asked a hypothetical question tailored to the specific facts in this case.[11] Linneman was asked to assume that Folger Adam was considering acquiring Stewart and Bayley in 1986; that the combined operating income was $2.3 million in 1984, $4 million in 1985 and $4.8 million in 1986; that Folger Adam repeatedly asked the seller and Salomon for operating managers' projections; that Folger Adam was given projections that predicted $4 million for 1987; that Folger Adam was told that the $4 million figure was the operating managers' projection, but that in the seller's estimation the number really should be higher; that the seller and Salomon knew that, in the spring of 1986, the operating managers had been asked to provide projections and did provide projections of $2.9 million for 1987, $2.3 million for 1988 and $2.5 million for 1989; that, in October 1986, in response to repeated requests for management projections, the operating managers predicted that

[11] Before commencing that line, plaintiff's counsel sought and received our ruling that hypothetical questions were permissible (tr. 1463-66).

the operating income for 1987 would be $2.4 million; and that defendants did not disclose those lower numbers to Folger Adam (tr. 1485-87). In response, Linneman testified over defendants' objection (tr. 1487) that, had the lower numbers been revealed, they would have altered the perceived risks and dramatically changed plaintiff's analysis (tr. 1488-92). Summing up, plaintiff's counsel asked Linneman if he had an opinion as to whether or not "our hypothetical Folger Adam or any other reasonable buyer would want to know" the operating managers' lower projections. Linneman, not surprisingly, responded "yes" (tr. 1492).

Finally, turning his attention to Salomon, plaintiff's counsel posed another fact-specific hypothetical question. He asked Linneman further to assume that Salomon knew that the operating managers had projected $2.9 million for 1987, $2.3 million for 1988 and $2.5 million for 1989; that Salomon attended a meeting on October 14, 1986 at which plaintiff asked for management projections; that at that meeting Folger was told that the projections were $4 million; that plaintiff was also told that those projections were conservative and that the number was really higher, closer to $5 million; and that Salomon, although aware of the lower numbers, did not disclose them (tr. 1492-93). Linneman gave his unequivocal opinion that Salomon's failure to disclose the existence of the lower numbers was not "consistent with what would be expected of a reputable investment banker" (tr. 1494). He elaborated:

> This is the type of information. Management on the site, their opinions about the future, the type of such that a sophisticated investment banker like Salomon knows is important. Knows is part of determining what buyers are willing to pay and which buyers are interested. They would have to sometime, somehow, some way to make sure that that information is fully and fairly disclosed before the transaction is con-

> cluded, fulfilling their role as an honest broker doing the normal things that an investment banker does (tr. 1494).

Without seeking to direct Linneman's attention to any other area, plaintiff's counsel thereupon ended the direct examination.

Although plaintiff does not point in its brief to any specific document, testimony or event about which it was precluded from eliciting testimony, it is clear that it was permitted to—and did—put virtually every one of its principal factual contentions before Linneman in the form of hypothetical questions. There is therefore no basis for the assertion that our rulings foreclosed eliciting Linneman's testimony as to "whether and why the particular misstatements and omissions would have been important to a reasonable investor, and whether Salomon Brothers acted contrary to investment banking standards by participating in those misstatements and omissions" (pl. br. at 19). As the above-summarized testimony illustrates, Linneman was permitted to do nothing less than express his opinion as to each of what, at least from plaintiff's point of view, were the "ultimate" issues in the case.

Similarly unfounded is plaintiff's assertion that Barbara Preiskel, who has served as a director of several major corporations and has been called upon to make investment decisions about numerous acquisitions and divestitures including at least fifteen strategic acquisitions, was not qualified to give the testimony that she did.

Preiskel defined a strategic acquisition as one designed "to enhance the business that you are in . . . , to either improve your product line, if it is a related product, or your market share or something which will improve the business that you are now conducting and you think you can improve it by acquiring another company which is related to it" (tr. 2648). She testified that, in making

such investment decisions, she never reviewed a selling memorandum prepared by a seller's investment banker, never asked to see one, and did not recall any of her fellow directors' having asked to see one (tr. 2659-61). She also testified that she had only once received projections which she understood to have been prepared by the management of the target company, never asked to see any, and did not recall her fellow directors ever having asked to see any (tr. 2661-64).

In response to hypothetical questions similar in structure to those that had been asked of Linneman by plaintiff's counsel, she gave her opinion that, in making an investment decision as to whether or not to make a strategic acquisition of companies such as Stewart and Bayley, she would not consider it important to know what the target companies' managers projected the companies' future sales and operating income would be as separately operated concerns (tr. 2666-71); that a reasonable investor who owned a company in a related business and who had an opportunity to conduct a due diligence investigation would not consider such projections important (tr. 2672); and that an investor who relied on such projections in such a situation would not be acting reasonably (tr. 2672-73). She explained that the situation would be different in the case of management leveraged buyout where the acquired company would continue to operate independently (tr. 2704).

She went on to testify that, in making a strategic investment decision, she would not consider it important to see a selling memorandum prepared by the seller's investment banker (tr. 2673-74); that, in her opinion, a reasonable investor who owned a company in a related business and had an opportunity to conduct a due diligence investigation would not consider that memorandum important (tr. 2674-75); and that any such investor who relied on such a memorandum would not be acting reasonably (tr. 2675-76).

Since, as above noted, her testimony was directed at plaintiff's principal contention (which had, in explicit detail, been supported by Linneman's testimony) that persons in the position of Shaykin and Stading, *i.e.*, the ultimate decisionmakers, would reasonably have relied on the statements that were claimed to have been made, it is inconsequential that—as was made clear on direct examination (tr. 2641, 2665) and then emphasized at length during plaintiff's counsel's cross examination (tr. 2684-88, 2691-93, 2696-97)—Preiskel herself did not conduct due diligence investigations, did not know what her companies' managers considered when they prepared their own projections for combined companies and did not know whether they reviewed target company management projections as part of that process.

CONCLUSION

As stated in footnote 9 on page 4, the deny the motion for a judgment notwithstanding the verdict for reasons heretofore expressed. Finding no merit in plaintiff's motion for a new trial, we likewise deny that motion.

SO ORDERED.

New York, New York
August 1, 1990

WHITMAN KNAPP, U.S.D.J.

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